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The Supreme Court of the United States

OCTOBER TERM, 1944

GEORGE E. DILLMAN AND W. R. HESS, ET AL,
Petitioners

vs.

UNITED STATES OF AMERICA
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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ATTORNEYS FOR PETITIONERS.

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To the Honorble Chief Justices and the Asociate Justices of the Supreme Court of th United States:

Your Petitioners, Fred C. Klinke and wife, Anna B. Klinke, Doyle Barne, W. R. Hess and wife, Tola Mae Hess, W. R. Hess, Jr., Mary B. Leopold, A. P. Bichsel, J. J. Vanve, J. J. Vance, as Guardian of the Person and Estate of J C. Vance, a Person of Unsound Mind, J. J. Vance as Administrator of the Estate of W. A. Vance, Deceased, Troy F. Vance, Maria J. Metcalf, a feme sole, F. A. Metcalf, Carl E. Metcalf, Ray J. Metcalf, Ralph B. Metcalf, W. C. Metcalf, Jr, Martha Metcalf, Clara Detten and husband, Leo F. Detten, Liberty Community Club, W. C. Slater, John Slater, Benny Bentley, George E. Dillman and wife, Clara Dillman, A. J. Busch-

koetter, Individualy, and as Executor of the Estate of August Blume, deceased, Leo Gable, Grace Pond Jenkins and husband, J. J. Jenkins, G. W. Bellinghausen, W. H. Kimble and wife, Mada Kimble, J. N. Garetson, Charles Russ, Sallie Ann Wood and husband Ben G. Wood, M. L. Vance, (one and the same person as Martin Vance), P. J. Obrecht and wife, Mary Elizabeth Capman Obrecht, W. H. Lusk, Elizabeth E. Lusk, J. W. Jones, J. H. Wigham, Bess Doty, Anna Pond Hulett and husband, George Hulett, John Bellinghausen, Hubert Hoing, one and the same person as Hubert Hoeing, Mary Hoing, one and the same person as Mary Hoeing, Verina Hoing, one and the same person as Verina Hoeing, Frank J. Grabber, Leo Kitten, Ida Kitten Beyke and husband, Valentine Beyke, Emma Kittn Schipp and husband, Raymond Schipp, Rosa Kitten Pond, and husband, Hilbert Pond, Laura Kitten Schipp and husband Edwin Schipp, Irina Kitten Verne and husband Edwin Verne, Elizabeth Kitten, a feme sole, Mary Buschkoetter and husband, Anthony F. Buschkoetter, Mrs. John Bellinghausen, Henry Bellinghausen, Henry Covington, Fred Haiduk and wife, Edith Haiduk, and R. B. Latham, pray this Court for the isuance of a Writ of Certiorari to review a final judgment of the United States Circuit Court of Appeals for the Fifth Circuit entered on the 28 day of December, 1944, reversing a decree of the United States District Court for the Northern District of Texas, Amarillo Division, and remanding this case to the District Court for the Northern District of Texas, and a motion for rehearing having been filed and overruled by Order of the Court on the 26th day of January, 1945.

STATEMENT OF THE MATTERS INVOLVED

This action was brought by th United States of America by Petition filed on March 21, 1942, seeking, by condemnation procedings, to acquire title to approximately 15,000 acres of land, together with the improvements and growing crops thereon, in Carson County, Texas, for the establishment of the Pantex Ordnance Plant. The Condemnees herein were the owners of the land and tenants occupying and cultivating crops on the land. On July 1, 1942, A Declaration of Taking was filed, by the United States Government in the trial court and a deposit of $452,763.00 was deposited with the Court as estimated just compensation for the thirty-seven several tracts of land and the improvements thereon, and the portion of the deposit allocated to the thiry-one tracts involved in this appeal totaled $429,263.00. The Commissioners allowed the Condemnees $665,566.49. And thereupon a trial was had in July, 1943, in which a judgment was rendered in December, 1943. The Condemnees were awarded, by the Trial Court, $783,907.73, and upon appeal by the United States Government to the Circuit Court of Appeal, said cause was reversed. The Trial Court specifically found in his opinion that the land and crops and improvements had no market value as defined by law, and found specific judgments for each of the individual owners of the land and improvements, as well as specific judgments for each tenant who had crops growing on the and. The trial of the case occupied about one month producing and submitting the evidence to the Court, and it was some sixty days

after the hearing of such evidence before the Court rendered an opinion, and in open Court rendered an opinio which was reduced to writing and subsequently filed as the opinion of the Court. The Trial Court, in rendering judgment, apportioned and decreed to each owner of land and improvements the specific amount to which he was entitld, including any growing crops that such owner of land and crops owned, and held and rendered judgment for each tenant for the specific amount of th crops as shown by the values found by him to exist, and also specifically found the damages that were due to such Condemnees as were entitled to severance damages. In rendering his opinion, the Trial Judge referred to the fact that he had, at the invitation of the Government's attorneys, gone upon the premises and inspected them, and also referred to the fact that he had interviewed the Commissioners and had the Government's attorney with him who acquiesced with him and was present at all times. The Circuit Court of Appeals reversed the case upon their findings that he had interviewed the Commissioners and had viewed and inspected the land prior to rendering his judgment. And, also, because of the introduction of testimony of offers to purchase and offers to sell. The errors, if any, committed by the Trial Court in viewing the land and in interviewing the Commissioners were either invited by the Government's counsel or were done with their acquiescence and knowledge without any objction or exceptions, and none of the Petitioners assigned any error, or made any complaint of the action of the Trial Court. This

opinion was rendered by Judge McCord and concurred in by Justice Holmes, to which Judge Sibley dissented.

The opinion of the Trial Court, as expressed by him, did not indicate what purpose he had in mind in intervewng the Commissioners, and after the opinion of the Circuit Court of Appeals was rendered, and after the overruling of the Motion for a rehearing, it was disclosed to Counsel for Petitioners for the first time that the Trial Judge, in desiring to see said Commissioners, had only in mind the purpose of ascertaining whether or not they had considered and determind all of th issues submitted to him in ascertaining the amount of damages that the Condemnees might have suffered, or might have been entitled to recover, he being of the opinion that probably h could not rnder a judgment in the Trial Court if the matter having been submitted to the Commissioners had not been fully considered by them, and all matters finally disposed of by them; and that he received no information from them as to the values of matters considred by them in determining their values; and thereupon Petitoiners filed with the Circuit Court of Appeals a Motion requesting such Honorable Court to recall the mandate and to permit the record to be corrected and to allow your Petitiners the privilege of filing a Second Motion for Rehearing. This motion was filed in the Crcut Court of Appeals on or about the 6th day of March, 1945, and was consdered by the Court and overruled on April 10, 1945, and at which time they modified

and made some correction in the original judgment.

BASIS OF JURISDICTION

The judgment sought to be reviewed is the judgment of the United States Circuit Court of Appeals for the 5th Circuit rendered on the 28th day of December, 1944. Record p. , reversing the judgment of the United States District Court for the Northern Disrict of Texas and remanding the case to the Trial Court, with instructions to try the case in accordance with the opinion so rendered. The nature of the case is presented fully in the preceding statements, of the matters involved but is one involving the correctness of the Circuit Court of Appeals' judgment in reversing the case upon error invited by the Appellant, therein, and upon errors committed in the presence of the Appellants' Counsel, not objected to, and upon their reversal on evidence that had been withdrawn from the Trial Court's consideration and upon evidence, that was offered, if any, remained in the record, entirely by the Appellant, in that Court. And upon conjctures and theories stated by that Honorable Court which was not based upon any evidence, that was introduced upon the trial of the cause, and upon their conjectures and theories that the Trial Court had received testimony which was not disclosed.

Petition for rehearing was filed in this case and was overruled on the 26th day of January, 1945. Petition for certiorari is presented herein on the

day of April, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by act of (February 13, 1925, C. 229, Section 1), (43, Stat. 938), (88 USCA Section 347). The jurisdiction of this Honorable Court under such Statute to review by certiorari a judgment of the Circuit Court of Appeals remanding a case to the District Court, is unlimited if it involves a question of sufficient importance to require the settling of the same by this Honorable Court and such is in direct conflict with this Honorable Court and other Circuit Court of Appeals, and it is exceedingly important to the public generally to determine whethr a party may invite the Trial oourt, to do an act and then complain of such act in the Higher Court, without any objection, made in the Lower Court, and it is also important to the public generally and to the jurisprudence of the United States to know whether the Judges of the Circuit Court of Appeals can draw inferences and conclusions which are not based upon the evidence and whether they can substitute their opinion as to values for that of the Trial Judge where his opinion is basd upon evidence within the range of the testimony given by the witnesses. At the trial, such decision being in direct conflict with the opinion of this Court in the case of Dooley vs. Pease, reported in the 45th Law Edition, page 457, in which this Court laid down this proposition of law:

Errors alleged in the findings of the Court are not subject to reversion by the Circuit Court of

Appeals or by this Court as there was other evidence upon which such finding could be made and also held where a case is tried by the Court, a jury having been waived, its findings upon questions of fact are conclusive in the Courts of review. It matters not how convincing the argument that upon the evidence the finding should have been different.

This holding by the Court in reversing this case on the findings by the Trial Judge is in direct conflict with the Circuit Court of Appeals of the 8th Circuit.

In the case of Willcuts vs. Stoltze, 73, Federal Reporter, 2nd, 868, in which the Court holds as follows:

"Findings of fact made by the Trial Court in an action at law, a jury having been duly waived, have the force and effect of a verdict by a jury. Even where proper and timely motion has been made, as in the case at bar, such findings will not be set aside if the record contains substantial evidence in their support."

This same principle is enunciated in the case of the United States vs. Perry, 55th Fderal, 2nd, 819; White vs. the United States, 48th Federal, 2nd, 178.

Judge Sibley in his dissenting opinion in the case at bar, says:

"The evidence as to offers, as evidence of value, were not objected to, and both sides offered much that might have been excluded, in a more careful trial. The figures reached by the Judge are well within the evidence properly admitted."

The holding of the Court reversing this case because the Court inspected the properties and was escorted by a Government Police Sergeant in charge of the properties, was error, because in conflict with Federal Rule 52 and Federal Rule 61, and section 391, Title 28 of the Judicial Code W. S., known as the Harmless Error Statute, and in conflict with other holdings of Circuit Court of Appeals. Pitcairn et al vs. Fisher, 78 F (2nd), 649, 8th Circuit. U. S. Matory, 71 Federal, 798.

If any error was committed thereby it was an invited error, and acquiesced in by the Attorneys for the United States Government, who were present at all times and who had invited the Court to make the inspection and, had the opportunity at all times to cross examine, and made no objection or exception to the Court's action. The Government cannot be heard to complain on appeal for error in which they acquiesced and for invited errors and the Court is presumed to discard at all times, any illegal evidence and no damage was shown to the Government by inspection of the premises.

The action of the Circuit Court reversing this case because the Trial Court visited the Commissioners was error and in conflict with other decisions of the Circuit Courts of Appeals, (authorities in foregoing paragraph). If any error was committed it was acquiesced in by the Government's attorneys who made no exception or objection to said actions.

The Circuit Court abused its discretion in not permitting the Appellees to correct the record so as to speak the truth. The Appellees sought in their

application to recall the mandate, correct the record and file a second motion for re-hearing, to clarify the record in order that the Circuit Court might have a full and compete clarification of what transpired between the Court and the Commissioners, which said application was overruled the Appellees on the 10th day of April, 1945. Said application is a part of this record and under oath of the attorneys for Appellees clearly shows that the Appellate Court did not have before it a complete and concise statement of the actions of the Trial Court and which they sought to correct under Federal Rule No. 75, Section 8, as follows:

"If anything material to either party is omitted from the record on appeal by error or accident, or is misstated therein, the parties by stipulation, or the District Court, either before or after the record is transmitted to the Appellate Court, or the Appellate Court, on a proper suggestion, or of its own initiative may direct that the omission or misstatement shal be corrected, and if necessary, that a supplemental record shall b certified and transmitted by the Clerk of the District Court."

If the Circuit Court had permitted the correction of the Trial Court's record it would have been shown that no error was committed by the Trial Court in visiting the Commissioners. Appellees respectfully request this Court to read said application to correct the record to ascertain the facts sought to be corrected, because the action of the Circuit Court in denying Appellees the right to correct the record is in conflict with Rule 75 quoted above.

QUESTIONS PRESENTED

I.

Can the Appellant in this case assign error and complain of the action of the Trial Court as to matters that were done at the invitation of its attorney, in the presence of the attorney, and acquesced in by the attorney, as viewing the land in litigation and interviewing the Commissioners, and then, on appeal, take advantage of the Trial Court's action and ask for and obtain reversal of the case?

II.

Where the Circuit Court reversed a case because of the consideration by the Court of matters not introduced in evidence affecting the land values, and evidence that the Court obtained from the Commissioners as to land values, and because of evidence of offers to buy and offers to sell had been introduced in evidence and thereafter withdrawn, should such reversal apply to the judgment of the Trial Court fixing the value for improvements and the value for growing crops thereon, in a case wherein there is involved some twenty-four suits for crops alone and some thirty-one suits for land values alone, and each of them independent and distinct from the other?

III.

Did the Appellate Court err in reversing fifty independent suits against as many people because they had doubt as to whether or not the aggregate award in all the suits of $783,907.73 as fixed by the Trial Judge and abundantly supported by com-

petent evidence, was the reasonable market value of the property, said aggregate valuation including all the crops, lands and improvements involved in approximately fifty suits on trial, and the aggregate valuation being treated by the Appellate Court on a basis as if the entire properties were owned by one individual and that the trial involved but one suit, when in fact separate judgments were entered for each Condemnee?

IV.

Did the Appellate Court err in reversing fifty or more independent suits tried jointly because there was evidence of offers to sell and offers to purchase in the area where sales were not completed, which said evidence was, by the Appellees' attorneys, and with the permission of the Trial Court, in open court, withdrawn from the consideration of the Trial Court, and if there was any evidence of that left in the record, it was introduced by the Appellant and not withdrawn?

V.

Can the Appellant Court, through a misinterpretation of certain words in the opinion by the Trial Court, set up for themselves statement of facts upon which they reversed the case, which facts added by the Appellate Judge, in his opinion, amounts to a mere conjecture, and is wholly unsupported in the record, and totally disregard the well settled Federal Rule No. 52, and Federal Rule No. 61, and Section No. 391, Title 28, of the Judicial Code of the United States, known as the

"Harmless Error Statute", when the Trial Court's opinion is amply supported by other legal and competent evidence upon the trial of a cause before the Court without a jury, without violating the rules and Statutes above cited?

VI.

It is universally held that in the trial of a cause before the Court in which a jury is waived, that it will be presumed that his judgment is based upon legitimate, competent and relevant testimony if there be such testimony in the record, upon which to base the same, and that he has and will disregard all other testimony. The Circuit Court of Appeals reversed this rule in reversing this case and undertook to hold that the presumption did exist that the Court was influenced by illegitimate, incompetent and irrelevant testimony in rendering his judgment, which was error by such Court.

VII.

Did the Circuit Court of Appeals err in overruling Appellees' Motion to Recall the Mandate and to Permit the Record to be Corrected in this cause and to Allow Appellees to File a Second Motion for Rehearing when they reversed the case upon presumptions and conjectures which they arrived at or derived from the oral opinion of the Trial Judge when said motion reflected that such presumptions and deductions were erroneous and would be so shown if permission was given for the same to be corrected?

CONCLUSION.

Wherefore, for the reasons herein advanced, it is respectfully submitted that the Supreme Court should exercise its jurisdiction to review by writ of certiorari the judgment of the Circuit Court of Appeals to the end that said Statutes of the United States defining "Harmless Error" shall not be violated, and that the rules of this Court governing the Court shall not be violated, and the precedence of the Circuit Court of Appeals, in setting aside a finding of fact by the Trial Judge which is supported by material evidence in accordance with the long established law of this forum, should not be effective, and an end be put to the conflict of decisions of the various Circuit Courts of Appeals and of this Court.

Respectfully submitted,

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By Riley Strickland
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